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Raising a "Substantial Question": The Key to Unlocking the Door Under the 1984 Bail Reform Act

Congress passed the Bail Reform Act of 1984¹ (the 1984 Bail Act) to restrict the availability of bail for convicted defendants awaiting their appeals.² The 1984 Bail Act reversed the presumption in favor of granting bail pending appeal which had existed under prior law.³ The prior law, the Bail Reform Act of 1966⁴ (the 1966 Bail Act), only required the court to determine if the issue on appeal was "frivolous"⁵ in order to deny bail. The 1984 Bail Act requires a heightened inquiry into the merits of the appeal. Under the 1984 Bail Act, a defendant shall be detained unless his appeal raises "a substantial question of law or fact likely to result in reversal or an order for a new trial."⁶ By raising the level of merit of the issues a defendant must appeal in order to obtain bail, Congress has made bail pending appeal the exception, not the rule.

Ten of the eleven federal circuits⁷ have decided cases interpreting the 1984 Bail Act. All ten circuits agree Congress intended to reduce the

1 18 U.S.C. § 3143 (1984).

2 Congress was clearly concerned with the presumption favoring bail pending appeal. As early as 1970, Congress, acting under its authority as the legislative body for the District of Columbia, enacted a more stringent rule for bail pending appeal than existed under the 1966 Bail Act. D.C. CODE ANN. § 23-1325(C) (1970) (precursor of the 1984 Bail Act). The House Report on the District of Columbia Act was explicit as to the reasons for congressional dissatisfaction with the prevailing criteria for bail pending appeal:

[O]nce a person has been convicted and sentenced to jail, there is absolutely no reason for the law to favor release pending appeal or even permit it in the absence of exceptional circumstances. First and most important, the conviction, in which the defendant's guilt of a crime has been established beyond a reasonable doubt, is presumably correct in law.

H.R. REP. NO. 907, 91st Cong., 2d Sess. 186-87 (1970). See also *United States v. Miller*, 753 F.2d 19, 22 (3d Cir. 1985).

3 Senate reports concerning the 1984 Bail Act state that the purpose of the 1984 Bail Act is to reverse the presumption in favor of bail, but not to deny bail entirely to persons who appeal their convictions. "The basic distinction between the existing provision [the 1966 Bail Act] and section 3143 is one of presumption It is the presumption [in favor of granting bail] that the Committee wishes to eliminate in section 3143." S. REP. NO. 225, 98th Cong., 1st Sess. 26 (1983), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 1, 29 (Supp. 9A).

4 18 U.S.C. § 3148 (1966), repealed by 18 U.S.C. § 3143 (1984).

5 The 1966 Bail Act read in relevant part: "[I]f it appears that an appeal is frivolous or taken for delay, the person may be ordered detained." 18 U.S.C. § 3148 (1966), repealed by 18 U.S.C. § 3143 (1984).

6 The 1984 Bail Act reads in relevant part:

(b) Release or detention pending appeal by the defendant — The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds —

...

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

18 U.S.C. § 3143 (1984).

7 The Fourth Circuit is the only federal court of appeals which to this date has not interpreted the phrase "substantial question" contained in § 3143(b)(2) of the 1984 Bail Act. See *infra* notes 13 & 25 and accompanying text for cites of other circuit courts which have interpreted § 3143(b)(2).

opportunity for a convicted defendant to obtain release on bail while his appeal is pending. The circuits disagree as to the extent Congress intended to restrict such bail. The controversy centers on defining the phrase "substantial question."⁸

Two standards have evolved from the circuits' attempts to define a "substantial question." One view states that a substantial question is "one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful or debatable."⁹ This view shall be referred to as the Fairly Debatable standard. The second interpretation defines a substantial question as "a 'close' question or one that very well could be decided the other way."¹⁰ This view shall be referred to as the Close Question standard. The courts of appeals agree that the Close Question standard is more restrictive than the Fairly Debatable standard.¹¹

Part I of this note discusses the Third Circuit's two-step approach for interpreting the 1984 Bail Act. The other nine circuits have adopted this approach. Part II describes the Fairly Debatable standard adopted by the Third and Ninth Circuits. Part III details the Close Question standard used by the majority of the circuits. Next, Part IV discusses the current status of the two standards. Finally, the note concludes that the Close Question view properly defines the level of merit necessary for an issue to be deemed substantial under the 1984 Bail Act.

I. Interpreting the 1984 Bail Act

Section 3143(b)(2) of the 1984 Bail Act requires an issue on appeal to raise a "substantial question of law or fact."¹² The Third Circuit was the first of the circuit courts to interpret section 3143(b)(2). In *United States v. Miller*,¹³ the defendants were convicted on charges of operating a large-scale nightly bingo game. The defendants appealed the introduction of testimony by a witness regarding the "net average" or "high-low" figure as to the nightly income from the bingo game.¹⁴ The district court denied the defendants' application for bail. Attempting to provide guidance for the district court, the Third Circuit devised a two-step process for evaluating section 3143(b)(2) to determine if release on bail should be allowed.¹⁵ The first step requires a court to determine whether the

8 See *supra* note 6.

9 *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985); *United States v. Handy*, 761 F.2d 1279, 1282 (9th Cir. 1985).

10 *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985).

11 See, e.g., *United States v. Bayko*, 774 F.2d 516 (1st Cir. 1985); *United States v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985); *United States v. Powell*, 761 F.2d 1227 (8th Cir. 1985); *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985); *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985).

12 See *supra* note 6. See also *Giancola*, 754 F.2d at 901 n.4 ("The statute refers to 'substantial question of law or fact.' The appellate court reviews asserted errors of law. Inasmuch as some questions of law implicate a factfinding process, i.e., sufficiency of evidence, we interpret the words 'question of . . . fact' as referring to that kind of question.").

13 753 F.2d 19 (3d Cir. 1985).

14 *Id.* at 24.

15 *Id.* The defendants first apply to the district court for bail based on the issues the defendants are raising on appeal. The district court must decide if the issues being raised by the defendants are

question raised on appeal is a substantial one.¹⁶ If the court finds that a substantial question exists, it proceeds to the second step: The court must find that if the appeal were decided in the defendant's favor, the decision would likely result in reversal or an order for a new trial.¹⁷ The Third Circuit then vacated the district court's denial of bail and remanded to the district court to determine whether the issue raised was substantial according to the newly stated two-step test.¹⁸

The *Miller* court pointed out that the second step does not require a district court to conclude that its own order is likely to be reversed.¹⁹ Nor, added the *Miller* court, can the phrase "likely to result in reversal or an order for a new trial" reasonably be construed to require the district court to predict the probability of reversal.²⁰ Specifically, the Third Circuit stated that "[t]he federal courts are not to be put in the position of 'bookmakers' who trade on the probability of ultimate outcome. Instead, that language must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal."²¹

In *United States v. Handy*,²² the Ninth Circuit described the purpose of each of the two steps. The word "substantial" in the first step defines the level of merit required in the question raised on appeal.²³ The phrase

substantial under the 1984 Bail Act. If the district court holds that the issues are not substantial, bail is denied. The defendants may then appeal the denial of bail to the circuit court. The circuit court will either affirm the district court's holding or reverse and remand the case back to the district court where bail shall be granted.

16 Our task is to give a reasonable construction to the statutory language in a manner that effectuates the congressional intent. Under the new act . . . a court must determine that the question raised on appeal is a "substantial" one, i.e., it must find that the significant question at issue is one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful.

Miller, 753 F.2d at 23.

17 "After the court finds that the question on appeal meets the new 'substantial' test, it must determine whether that issue is sufficiently important to the merits that a contrary appellate ruling is likely to require reversal or a new trial." *Id.*

18 *Id.* at 24.

19 The statutory language requiring a finding that the appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial" cannot be read as meaning, as the district court apparently believed, that the district court must conclude that its own order is likely to be reversed.

In the first place, such a reading would render language in the statute surplusage because every question that is likely to be reversed must by definition be "substantial." In the second place, we are unwilling to attribute to Congress the cynicism that would underlie the provision were it to be read as requiring the district court to determine the likelihood of its own error.

Miller, 753 F.2d at 23.

20 *Id.*

21 *Id.* The court further stated:

A question of law or fact may be substantial but may, nonetheless, in the circumstances of a particular case, be considered harmless, to have no prejudicial effect, or to have been insufficiently preserved. A court may find that reversal or a new trial is "likely" only if it concludes that the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial . . . If the error would be considered harmless or reversal or new trial would otherwise not be the remedy, the Act's requirements are not satisfied.

Miller, 753 F.2d at 23.

22 761 F.2d 1279 (9th Cir. 1985).

23 *Id.* at 1281.

"likely to result in reversal" contained in the second step identifies the type of question the appeal must present.²⁴

All of the circuits which have interpreted the 1984 Bail Act have adopted the two-step approach of the *Miller* court.²⁵ These courts also agree with the Third Circuit's treatment of the second step.²⁶ The courts disagree when defining the phrase "substantial question" for the purposes of the first step of the *Miller* test. As a result of this disagreement, the Fairly Debatable and Close Question standards arose.²⁷

II. The Fairly Debatable Standard

The Fairly Debatable standard is the minority definition of the phrase "substantial question." This view is shared by the Third Circuit, which originated the standard, and the Ninth Circuit, which explained the standard's origins.

A. The Third Circuit Creates the Standard

Congress enacted the 1984 Bail Act to reverse the presumption in favor of bail after conviction. Congress did not intend, however, to eliminate all bail after conviction. The Third Circuit, in *Miller*, found itself in the position of pioneering a definition for the phrase "substantial question" for the purposes of the new Act. The court needed a definition which had more merit than the prior "nonfrivolous" standard, but which would not effectively preclude all applications for bail pending appeal.

The *Miller* court defined a substantial question as "one which has not been decided by controlling precedent, or which is fairly doubtful."²⁸ The Eleventh Circuit criticized this definition in *United States v. Giancola*.²⁹ The *Giancola* court reasoned that the lack of controlling precedent was not a proper measure to distinguish substantial from insubstantial issues.³⁰ The Eleventh Circuit therefore refused to adopt the *Miller* court's definition of substantial question.³¹ The Ninth Circuit agreed with the Eleventh Circuit's observation that, viewed in isolation, the lack of controlling precedent might not be a proper standard to separate substantial

²⁴ *Id.*

²⁵ See *United States v. Pollard*, 778 F.2d 1177, 1181-82 (6th Cir. 1985); *United States v. Bayko*, 774 F.2d 516, 522-23 (1st Cir. 1985); *United States v. Bilanzich*, 771 F.2d 292, 298-99 (7th Cir. 1985); *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985); *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985); *United States v. Powell*, 761 F.2d 1227, 1231-33 (8th Cir. 1985); *United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985); *United States v. Giancola*, 754 F.2d 898, 900 (11th Cir. 1985).

²⁶ See *supra* note 25.

²⁷ See *supra* notes 9-10 and accompanying text.

²⁸ See *supra* note 9 and accompanying text. The *Miller* court did not provide any insight to the sources it relied upon to arrive at the Fairly Debatable standard.

²⁹ 754 F.2d 898, 901 (11th Cir. 1985).

³⁰ We note that an issue may be without controlling precedent largely because that issue is so patently without merit that it has not been found necessary for it to have been resolved. Thus, an issue could well be insubstantial even though one could not point to controlling precedent. Similarly, there might be no precedent in this circuit, but there may also be no real reason to believe that this circuit would depart from unanimous resolution of the issue by other circuits.

Giancola, 754 F.2d at 901.

³¹ *Id.*

from insubstantial questions.³² The Ninth Circuit, however, aligned itself with the Third Circuit, and chose to adopt the *Miller* court's view of substantial question.³³

B. *The Ninth Circuit's Historical Approach*

The Ninth Circuit remains the only court of appeals to agree with the Third Circuit's Fairly Debatable standard. In *United States v. Handy*,³⁴ the defendant was convicted of conspiracy to import heroin, importation of heroin, and possession of heroin with intent to distribute. Handy appealed the admissibility of alleged illegally obtained evidence. The district court held that the appeal raised a substantial question, but did not believe reversal was likely. Therefore, the district court denied the defendant bail. The Ninth Circuit did not feel the district court had properly applied the 1984 Bail Act. As a result, the Ninth Circuit reversed and remanded.³⁵

In deciding the *Handy* case, the Ninth Circuit shed some light on the basis for the Fairly Debatable standard. The *Handy* court explained that the Third Circuit had merely given the phrase "substantial question" its historical meaning.³⁶ The *Handy* court reasoned that an historical approach was proper because the phrase had been used in prior laws.³⁷ The court found the historical approach to be correct even though it involved earlier rules or statutes or the phrase arose in different contexts.³⁸

32 The Third Circuit referred to a question that is "novel, has not been decided by controlling precedent." *Miller*, 753 F.2d at 23. The Eleventh Circuit suggested that, if viewed in isolation, such a standard might not be sufficient to separate substantial from non-substantial questions. We agree with that observation and think the Third Circuit would also.

Handy, 761 F.2d at 1282 n.2.

33 "[W]e adopt the interpretation of the 1984 Bail Act first set forth by the Third Circuit in *Miller*." *Id.* at 1283.

34 761 F.2d 1279 (9th Cir. 1985).

35 *Id.* at 1284.

36 Historically the phrase "substantial question" has referred to questions that are "fairly debatable." Included within this definition have been questions that are novel and not readily answerable. See also *D'Aquino v. United States*, 180 F.2d 271, 272 (11th Cir. 1950) (The question may be "substantial" even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question may be new and novel. It may present unique facts not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court. The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable.).

Handy, 761 F.2d at 1281.

37 The Supreme Court has recently reiterated that a "substantial question" is one that is "fairly debatable." [W]hen discussing the level of merit required in a habeas appeal involving a death penalty, the Supreme Court noted that a "'substantial showing of the denial of [a] federal right'" is "'something more than the absence of frivolity.'" The Court continued, defining a "substantial question" as one that poses issues "'debatable among jurists of reason.'"

Handy, 761 F.2d at 1281-82. See also *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

38 We recognize that all the cases we have discussed . . . involve earlier rules or statutes or arose in different contexts. However, a review of the history of legislative enactments that preceded the adoption of the current statute and a consideration of that statute as a whole persuade us that giving "substantial question" its well-established, customary meaning is fully consistent not only with precedent and logic but with the overall statutory scheme as well.

Handy, 761 F.2d at 1282.

The Ninth Circuit concluded under the historical approach that a "substantial question" is one which is fairly debatable or fairly doubtful.³⁹ The Third Circuit subsequently adopted the *Handy* court's historical approach.⁴⁰

The Ninth Circuit did not believe it was necessary to interpret the phrase "substantial question" in an overly strict manner. The *Handy* court noted that the 1984 Bail Act, besides incorporating the stricter substantial question criterion, contained other significant changes which worked to "toughen the law with respect to bail pending appeal."⁴¹ Based on its interpretation of the historical use of the phrase "substantial question," and the additional restrictive measures contained in the new law, the Ninth Circuit concurred with the Third Circuit's Fairly Debatable standard.⁴²

III. The Close Question Standard

The federal courts of appeals, outside of the Third and Ninth Circuits, which have defined a substantial question, agree with the Eleventh Circuit's view⁴³ articulated in *United States v. Giancola*.⁴⁴ These courts define a substantial question as "a 'close' question or one that very well could be decided the other way."⁴⁵ In addition, the *Giancola* court held that a substantial question is one of more substance than is necessary to a finding that it is not frivolous.⁴⁶ According to the Eleventh Circuit's analysis, no blanket categories exist for what questions may or may not be "substantial" ones.⁴⁷ The courts must determine whether a question is substantial on a case-by-case basis.⁴⁸ All of the circuit courts, including the Third and Ninth Circuits, agree with these additional observations of the Eleventh Circuit.⁴⁹

39 "In *Miller*, the Third Circuit said that a 'substantial question' is one that is 'fairly doubtful.' In our view, that definition is synonymous with 'fairly debatable.'" *Id.*

40 "[T]he *Handy* court emphasized its support of the historically-based 'fairly debatable' interpretation of the term 'substantial.' We find this approach consistent with that traditionally taken by the courts . . . and [we] adopt the historical approach of the *Handy* court." *United States v. Smith*, 793 F.2d 85, 89-90 (3d Cir. 1986).

41 Congress added a new requirement that the question be of a type that, if resolved in the defendant's favor, would be likely to result in reversal or a new trial. Congress shifted the burden of proof from the government to the defendant. Each of the changes contained in the Bail Reform Act of 1984 makes it considerably more difficult for a defendant to be released on bail pending appeal. . . . Accordingly, we see no need to define "substantial question" in a manner contrary to that in which it has always previously been defined, even assuming we would have the authority to do so.

761 F.2d at 1283.

42 *Handy*, 761 F.2d at 1282. See also *supra* note 39.

43 *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985); *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985); *United States v. Bilanzich*, 771 F.2d 292, 298-99 (7th Cir. 1985); *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985); *United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985); *United States v. Valera-Elizondo*, 761 F.2d 1020, 1024 (5th Cir. 1985); *U.S. v. Powell*, 761 F.2d 1227, 1232 (8th Cir. 1985).

44 754 F.2d 898, 901 (11th Cir. 1985).

45 See *supra* notes 43-44.

46 *Giancola*, 754 F.2d at 901.

47 *Id.*

48 *Id.*

49 See *Smith*, 793 F.2d at 89; *Handy*, 761 F.2d at 1282 n.2. See also *supra* note 43.

The majority of the circuits have chosen to adopt the more restrictive Close Question standard.⁵⁰ These courts have asserted numerous reasons for their choice. The Eighth Circuit⁵¹ did not believe the Fairly Debatable view would work much of a change in the prior law.⁵² The Fifth Circuit⁵³ agreed with the Eleventh Circuit that the absence of controlling precedent was not dispositive,⁵⁴ and that the Close Question definition embodies the appropriate level of merit.⁵⁵ The Tenth Circuit⁵⁶ felt the Close Question standard was necessary to reverse the presumption favoring bail which had previously existed.⁵⁷ The basic argument of those circuits using the Close Question standard was first stated in *United States v. Powell*⁵⁸ and echoed by the First Circuit in *United States v. Bayko*:⁵⁹ "We doubt that Congress would have gone to the trouble of passing a new statute to obtain no more of a change than is brought about by either *Miller* or *Handy*."⁶⁰

The *Giancola* court developed the Close Question standard because, in its opinion, the Fairly Debatable view incorrectly used the absence of controlling precedent as a guide to distinguish substantial from insubstantial questions.⁶¹ Even the Ninth Circuit, while adopting the Fairly Debatable standard, admitted that this portion of the Fairly Debatable standard is flawed.⁶² According to the *Giancola* court, an issue may be deemed substantial under the Fairly Debatable standard even though that issue is patently without merit because of the incorrect use of the lack of controlling precedent as a basis for deciding whether an issue is substantial.⁶³ By only looking for the lack of controlling precedent, a court does not investigate the merits of the issue on appeal. By taking this approach, a court might recognize a meritless appeal as fulfilling the "substantial question" requirement of the 1984 Bail Act.⁶⁴

The Close Question jurisdictions fill this void by considering the merits of every issue on appeal to determine if the issue is substantial. This inquiry into the merits involves a higher level of scrutiny than the Fairly Debatable standard. The range of issues which are "fairly debatable" contains within it a subset of "close" questions which ride the razor's edge and "very well could be decided the other way."⁶⁵ The Close

50 See *supra* note 43.

51 *United States v. Powell*, 761 F.2d 1227 (8th Cir. 1985).

52 "The *Handy* and *Miller* formulations of what 'substantial question' means would not work much of a change in prior law. . . . We believe *Giancola* is more responsive to the announced purpose of Congress, which was, bluntly, that fewer convicted persons remain at large while pursuing their appeals." *Id.* at 1232.

53 *United States v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985).

54 *Id.* at 1024.

55 *Id.*

56 *United States v. Affleck*, 765 F.2d 944 (10th Cir. 1985).

57 *Id.* at 952.

58 See *supra* note 51.

59 774 F.2d 516 (1st Cir. 1985).

60 *Id.* at 523. See also *Powell*, 761 F.2d at 1232.

61 See *supra* note 30 and accompanying text.

62 See *supra* note 32 and accompanying text.

63 754 F.2d at 901. See also *supra* note 30.

64 *Id.* See also *supra* note 32 and accompanying text.

65 *Giancola*, 754 F.2d at 901.

Question standard recognizes fewer issues as raising substantial questions. This closer scrutiny results in restricting bail pending appeal to a greater degree than does the Fairly Debatable standard.⁶⁶

IV. Current Status of the Two Standards

Only the Third Circuit⁶⁷ follows the historical approach announced by the Ninth Circuit.⁶⁸ Various circuit court opinions⁶⁹ have criticized the *Handy* court's historical approach due to circumstances the Ninth Circuit itself realized.⁷⁰ Namely, the historical approach relies on cases which interpreted the phrase "substantial question" in different contexts,⁷¹ or bail cases arising under the prior law which presumptively favored bail.⁷² Thus, those cases were either irrelevant to begin with, or they became irrelevant due to the reversal of the presumption favoring bail. For these reasons, the Ninth Circuit's historical approach has not gained wide acceptance. In fact, even the dissenting and concurring opinions in the Ninth and Third Circuits fervently criticize this approach.⁷³ The *Handy* court's historical approach is an unacceptably anachronistic view of what constitutes a substantial question under the 1984 Bail Act.

At times it is difficult to discern how much overlap exists between

66 *Powell*, 761 F.2d at 1232. See also *supra* note 52.

67 *Smith*, 793 F.2d at 89-90. See also *supra* note 40.

68 *Handy*, 761 F.2d 1279.

69 See, e.g., *Smith*, 793 F.2d at 90 (Hunter III, J., concurring); *Powell*, 761 F.2d at 1232; *Handy*, 761 F.2d at 1284 (Farris, J., dissenting).

70 *Handy*, 761 F.2d at 1282. See also *supra* note 38.

71 Judge Farris' dissent in *Handy* states:

[W]hile the majority places reliance on the more recent formulation of "substantial question" set out in *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983), that case and the authority it in turn relied on were decided in the context of a habeas proceeding, where "doubts should be resolved in favor of petitioner." . . . Again the presumption in the cases on which the majority relies—including *Gardner v. Progne*, 558 F.2d 548 (9th Cir. 1977)—is exactly the opposite under the 1984 Bail Reform Act.

Handy, 761 F.2d at 1285 (Farris, J., dissenting). See also *Smith*, 793 F.2d at 91 (Hunter III, J., concurring); *Gordon v. Willis*, 516 F.Supp. 911, 912 (N.D. Ga. 1980).

72 Judge Farris made several other observations while criticizing the historical approach in his dissenting opinion in *Handy*:

The cases cited by the majority in support of its definition of "substantial question" are inapplicable because they rely on a presumption in favor of bail . . . For example, the majority quotes extensively from *D'Aquino* . . . and borrows from it the definition of a "substantial question" as one that is "fairly debatable." But *D'Aquino* proceeds from the premise that "[i]t has long been a principle of federal law that bail after conviction and pending appeal is a remedy normally available to a prisoner." That view is now invalid in light of Congress' stated intent that bail pending appeal should be available only under "exceptional circumstances," and that there is a "presumption of detention pending appeal." Because *D'Aquino* relies on an obsolete presumption against detention in reaching its conclusion that a "substantial question" is one that is "plainly not frivolous," and Congress has clearly indicated its intention that the new standard is to be higher than "nonfrivolous," it is inappropriate to rely on *D'Aquino* to interpret the 1984 Bail Reform Act. Similarly, the majority's reliance on *Herzog v. United States*, 75 S.Ct. 349 (1955) is misplaced because *Herzog* was based on the premise that "[d]oubts whether [bail pending appeal] should be granted or denied should always be resolved in favor of the defendant."

Handy, 761 F.2d at 1284. (Farris, J., dissenting). See also *Powell*, 761 F.2d at 1232.

73 "[T]he *Handy* approach is inappropriate, given Congress's clearly expressed desire that courts use a new approach applying a stricter standard for bail." *Smith*, 793 F.2d at 92 (Hunter III, J., dissenting). See also *supra* notes 71-72.

the two standards, or where one begins and the other ends. The Second Circuit noted this fact in *United States v. Randell*:⁷⁴ "We do not believe that these definitions of 'substantial' differ significantly from each other, but if we were to adopt only one, it would be the language of *Giancola*."⁷⁵ Recent Third Circuit decisions⁷⁶ have further blurred the already murky distinction indicated by the Second Circuit.

In *United States v. Smith*,⁷⁷ the Third Circuit confronted an issue on appeal which the district court reluctantly deemed substantial only because the issue was not governed by controlling precedent.⁷⁸ The issue questioned whether, under Federal Rule of Criminal Procedure 23(b), an eleven member jury could constitutionally continue to deliberate.⁷⁹ The district court, recognizing the lack of controlling precedent for the issue, held that the issue satisfied the Fairly Debatable standard and was therefore a substantial question.⁸⁰ The district court found the issue to be substantial even though that court felt the defendant had almost no chance to prevail on appeal.⁸¹ The district court felt obligated to release the defendant on bail due to an issue it viewed as being patently without merit.⁸² The *Giancola* court had contemplated precisely such a result when it criticized⁸³ the Third Circuit's adoption of the Fairly Debatable standard in *Miller*.⁸⁴

The *Smith* court faced the dilemma of recognizing a meritless appeal as being substantial or acknowledging that its Fairly Debatable standard was flawed. The court did neither. Rather, it retained its Fairly Debatable standard and held the appeal to be insubstantial.⁸⁵ In so doing, the Third Circuit was unfaithful to its definition of a substantial question and violated the two-step approach it had developed to interpret the 1984 Bail Act.

In *Smith*, the Third Circuit rationalized its decision to reverse the district court as follows:

74 761 F.2d 122 (2d Cir. 1985).

75 *Id.* at 125.

76 *United States v. Messerlian*, 793 F.2d 94 (3d Cir. 1986); *United States v. Smith*, 793 F.2d 85 (3d Cir. 1986).

77 793 F.2d 85 (3d Cir. 1986).

78 The trial court emphasized its reluctance to find a substantial question but concluded that it was required to do so by our opinion in *Miller*. "[T]here is no controlling precedent with respect to the 11-person jury. Thus, the question falls within the definition of a substantial question under *U.S. v. Miller*."

Smith, 793 F.2d at 88.

79 Federal Rule of Criminal Procedure 23(b) reads:

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

FED. R. CRIM. P. 23(b).

80 *Smith*, 793 F.2d at 88.

81 *Id.*

82 *Id.*

83 *Giancola*, 754 F.2d at 900. See also *supra* note 30.

84 *Miller*, 753 F.2d at 23. See also *supra* note 16.

85 793 F.2d at 88-89.

Our definition of a substantial question required that the issue on appeal be *significant* in addition to being novel, not governed by controlling precedent or fairly doubtful. The district court focused solely on the absence of controlling precedent and, in so doing, failed to determine whether the Rule 23(b) issue constituted a significant question.⁸⁶

The Fairly Debatable standard as first articulated by *Miller* does not contain the requirement that an issue be significant *before* it can be found to be substantial.⁸⁷ The *Smith* court failed to follow the two-step approach developed by the *Miller* court to interpret section 3143(b)(2) of the 1984 Bail Act.⁸⁸ In *Miller*, the Third Circuit stated that the language of the second step “must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal.”⁸⁹ The significance of the issue is considered in the second step *after* the issue has been held to be a substantial one in the first step.⁹⁰

The Fairly Debatable standard is used in the first step of the *Miller* test to define the level of merit.⁹¹ The second step identifies the type of question the appeal must present.⁹² The court must decide the significance of an issue in the second step when dealing with the type of question presented. It was improper for the Third Circuit in *Smith* to investigate the significance of the issue when deciding if it was substantial. The *Smith* court felt compelled to do so because a portion of the Fairly Debatable standard is flawed and allows possible meritless appeals to fulfill the substantial question requirement only because they are novel or lack controlling precedent.⁹³ The court refused to remedy this flaw.⁹⁴

The *Smith* court has effectively merged the two steps of the *Miller* test and would now require a determination of significance before an issue can be held to be substantial.⁹⁵ Not only does this merger violate the two-step approach, but it also burdens the Fairly Debatable standard with an additional criterion—that of significance. In *Smith*, the Third Circuit is unfaithful both procedurally to the two-step approach and substantively to the Fairly Debatable standard previously developed by that circuit in *Miller*.

86 *Id.* at 88 (emphasis in original).

87 See *supra* note 16 and accompanying text. The *Miller* court used the phrase “significant question” as a synonym for the phrase “substantial question.” 753 F.2d at 23. A substantial question is defined by the *Miller* court as “one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful.” *Id.* Therefore, the phrase “significant question,” being a synonym of the phrase “substantial question,” is similarly defined and similarly flawed.

88 See *supra* notes 13-17 and accompanying text.

89 *Miller*, 753 F.2d at 23. See also *supra* note 21 and accompanying text.

90 See *supra* notes 16-17 and accompanying text.

91 *Handy*, 761 F.2d at 1281. See also *supra* note 23 and accompanying text.

92 *Handy*, 761 F.2d at 1281. See *supra* note 24 and accompanying text.

93 See *supra* notes 30-32 and accompanying text.

94 See *supra* note 32 and accompanying text. The *Handy* court agreed with the Eleventh Circuit that using the lack of controlling precedent to determine whether a question was substantial could prove to be inadequate. The *Handy* court believed the Third Circuit would concur in acknowledging this deficiency in the Fairly Debatable standard. The Third Circuit, however, refused to recognize any such deficiency in *Smith*.

95 “Our definition of a substantial question requires that the issue on appeal be *significant* in addition to being novel, not governed by controlling precedent or fairly doubtful.” *Smith*, 793 F.2d at 88 (emphasis in original).

The Third Circuit had several alternatives available to it which, if chosen, would not have resulted in such a twisted decision as that reached in *Smith*. First, the Third Circuit could have revised the Fairly Debatable standard and removed the "novel, which has not been decided by controlling precedent" language. This would have recognized the flaw which exists in the definition and which allows some meritless appeals to be found substantial. Second, the Third Circuit could have held that all substantial questions must be fairly debatable. If a novel issue is raised, it too must be fairly debatable. This alternative would also eliminate the possibility of meritless appeals being held to be substantial merely because they are novel or lack controlling precedent. Third, the *Smith* court could have left the Fairly Debatable standard intact and still denied bail to the defendant in that case. The court could have conceded that the issue raised a substantial question under the first step of the *Miller* test, but lacked the requisite significance of the second step. The *Smith* court could have legitimately denied bail on this basis. This result would have been consistent with both the two-step approach and the Fairly Debatable definition.

Instead, the court misinterpreted the standard it purported to apply. The *Smith* court should have denied bail based on a lack of significance in the second step. The issue did present a substantial question under the court's working definition. The court mistakenly denied that a substantial question existed.

The Third Circuit, in *Smith*, seemed to be confused with the structure of the *Miller* test which that court itself had developed earlier in *Miller*. The *Smith* court later ridiculed the Close Question standard because that standard considers the merits of an issue on appeal before it deems that issue to be substantial.⁹⁶ The *Smith* court stated that this approach resulted in the "judicial bookmaking" it had condemned in *Miller*.⁹⁷ The *Smith* court is mistaken. The Close Question standard investigates the merits of the appeal in the first step before a question is held to be substantial.⁹⁸ The "judicial bookmaking" which the Third Circuit had condemned in *Miller* dealt with interpreting the phrase "likely to result in reversal or an order for a new trial" contained in the second step of the *Miller* test.⁹⁹ The concurring opinion in *Smith* points out the fallacy of the court's argument.¹⁰⁰

The Third Circuit decided *United States v. Messerlian*¹⁰¹ closely on the heels of its bewildering *Smith* opinion. The *Messerlian* court's uneasiness

96 "To accept the *Giancola* modification would be to resort to the judicial bookmaking condemned in *Miller*." *Id.* at 89.

97 *Id.*

98 The circuits which follow the Close Question standard have all adopted the *Miller* two-step approach for interpreting the 1984 Bail Act. Under this interpretive approach, the use of the Close Question standard occurs in the first step while the court is determining if the issue on appeal is substantial.

99 *Miller*, 753 F.2d at 23. See also *supra* notes 17-21 and accompanying text.

100 "I believe trial judges can consider the merit of an issue to decide whether it is a close question. Such a determination does not involve the guesswork that would be involved if a judge had to assess the likelihood of being reversed." 793 F.2d at 91 (Hunter III, J., concurring).

101 793 F.2d 94 (1986).

with *Smith* is evident from the start. The *Messerlian* court talks of being "bound" by *Smith*.¹⁰² Rather than affirm the *Smith* court's rationale, *Messerlian* further undercuts the Third Circuit's adherence to the Fairly Debatable standard. After *Smith* ridiculed the Close Question standard, the Third Circuit, in *Messerlian*, examined whether the issue on appeal was substantial by reference to its own Fairly Debatable as well as the Close Question standard.¹⁰³ The Third Circuit seems to be drifting nearer and nearer to the Close Question standard. First, *Smith* required an issue to be significant before it could be substantial.¹⁰⁴ This merging of the two steps of the *Miller* test was an improper attempt by the court to look into the merits of the issue. Instead of wreaking havoc with the *Miller* test, the Third Circuit should either exorcise the language in the Fairly Debatable standard which allows meritless appeals to be held substantial, or adopt the Close Question standard, which by its nature looks into the merits of every appeal. Second, *Messerlian* moved away from strict adherence to the Fairly Debatable standard when it applied the Close Question standard as well as its definition to determine if the issue raised a substantial question. The Third Circuit's faith in the Fairly Debatable standard is clearly shaken and the court's recent cases have demonstrated clear signs of wavering.

V. Conclusion

The 1984 Bail Act reverses the presumption favoring bail which had existed under the 1966 Bail Act by requiring that issues on appeal raise a substantial question before a defendant is granted bail. The Fairly Debatable and Close Question standards were developed by the circuits to define what constitutes a substantial question.

It is clear that the Close Question standard is the more restrictive of the two. The Fairly Debatable standard does not work as much of a change in the law as Congress desired when it enacted the 1984 Bail Act. The Close Question standard looks into the merits of every appeal, while the Fairly Debatable standard, as long as it defines an issue as raising a substantial question merely because the appeal is novel or lacks controlling precedent, contains a large void through which meritless appeals can pass.

Support for the Fairly Debatable standard is subject to valid criticism and has been wavering. The *Handy* court's historical approach, supporting the Fairly Debatable view, is outdated and has no place in the 1984 Bail Act. The Third Circuit, which originated the Fairly Debatable standard, has shown reluctance in recent cases to adhere to that standard.

The circuits should uniformly adopt the standard which best effectuates the intent of Congress. The choice should be the standard which can be properly applied with the least amount of rationalizing. The

102 "In the present appeal we are bound by *Smith*." *Id.* at 96.

103 "[U]nder either the *Giancola* or *Handy* standard, we are satisfied that [the defendant] *Messerlian* has presented substantial issues on appeal within the formula of *Smith*." *Id.*

104 See *supra* note 86 and accompanying text.

Close Question standard properly defines what constitutes a substantial question under the 1984 Bail Act.

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